ARTICLES

Contextualizing *Actus Reus* under Article 25(3)(d) of the ICC Statute

Thresholds of Contribution

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Abstract

Individualizing accountability predicated on group crime is a recurring challenge facing international criminal law (ICL). A major aspect of this struggle involves identifying and describing the threshold degree of contribution to a group crime necessary to warrant criminal liability. This article considers three ICL modes of liability specifically oriented to account for group criminality: joint criminal enterprise (JCE) at the ad hoc tribunals and co-perpetration and contribution liability at the International Criminal Court (ICC). Through this analysis it is asserted that current jurisprudence demonstrates the necessity of utilizing a contextual approach to actus reus *in order to flexibly account for group criminal dynamics while simultaneously avoiding the imposition of guilt by association. While both JCE and co-perpetration have incorporated formal contextual* actus reus *thresholds requiring a 'significant act' and 'essential contribution' to the relevant criminal enterprise and charged crime, respectively, contribution liability under Article 25(3)(d) of the ICC Statute currently lacks such a mechanism. In* Mbarushimana, *ICC Pre-Trial Chamber I held that Article 25(3)(d) requires at least a 'significant' contribution to the predicate group crime(s). On appeal, Judge Silvia Fernández de Gurmendi advocated for an alternate approach requiring analysis of the 'normative and causal links' between the conduct of the accused and the larger group crime. Ultimately, a majority of the Appeals Chamber simply declined to address the issue, dismissing the case on other grounds. This article argues that the two competing approaches to Article 25(3)(d) outlined in* Mbarushimana *differ primarily in name, rather than substance, as both place contextual qualifications on* actus reus *and appear to provide for substantially the same results in application. As such, this article concludes that the choice between the two approaches is wholly secondary to the pressing need for the definitive adoption of either approach in order to appropriately bound* actus reus *under Article 25(3)(d) moving forward.*

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1. The Problem of Collective Criminality and Article 25(3)(d) ICC Statute

International crimes are typically committed by groups, rather than individuals. As such, the need to achieve balance between accounting for group crime dynamics and the foundational principles of personal culpability[1] and legality[2] has challenged efforts to craft international modes of liability that take into account the oft-competing goals of flexibility, clarity and preventing imposition of guilt by association. This article examines the *actus reus* requirements of three key modes of liability designed to provide for individual accountability predicated on group crimes under international criminal law (ICL): joint criminal enterprise (JCE), utilized by the ad hoc tribunals and co-perpetration and contribution liability, utilized at the International Criminal Court (ICC). Through this process, *actus reus* language within both JCE and co-perpetration jurisprudence is identified demonstrating the need to bound *actus reus* elements based on contributions to group crimes through a contextual process.

These contextual approaches are then contrasted with ICC Statute Article 25(3)(d) liability, which currently contains no formal *actus reus* limitation and provides for liability for accused who contribute to a group crime 'in any other way' than those specified in other modes of liability under Article 25(3).[3] This open-ended language led to varying interpretations in *Mbarushimana*, as judges struggled to define some generally applicable limit on the scope of Article 25(3)(d) *actus reus*. *Mbarushimana* Pre-Trial Chamber

1 The principle of personal culpability provides that an accused can only be held responsible for crimes he actually participated in. The principle thus forbids the imposition of guilt by association or organizational liability. See e.g. Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 186 [*Tadić* Appeals Judgment] (Stating that the principle of personal culpability establishes that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).').

2 The principle of legality, or *nullum crimen sine lege* ('no crime without law') under ICL requires that laws providing for penal sanctions, including modes of liability, must be sufficiently clear and accessible to the accused for him to anticipate potential liability when pursuing the allegedly criminal course of conduct at issue. See e.g. Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, *Milutinović and others* (IT-99-37-AR72), Appeals Chamber, 21 May 2003, § 21 (stating that for a mode of liability to survive a legality challenge it must be, inter alia, sufficiently provided for in the relevant law in a form accessible to the accused and such person 'must have been able to foresee that he could be held liable for his actions if apprehended.'); see also *Streletz and others v. Germany*, ECtHR [GC] (2001), Applications nos 34044/96, 35532/97 and 44801/98, § 91 (stating that to satisfy the principle of *nullum crimen*, the proper enquiry is 'whether, at the time when they were committed, the applicants' acts constituted offences defined with sufficient accessibility and foreseeability under international law'). For a general overview of the requirements of legality under ICL, see J.L. Watkins and R.C. DeFalco, 'Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia', 63 *Rutgers Law Review* (2010) 193, at 199–204.

3 Art. 24(3)(d) ICCSt.

I and Appeals Chamber Judge Silvia Fernández de Gurmendi proposed similar, yet differently oriented *actus reus* qualifications.[4] The Pre-Trial Chamber, borrowing from JCE jurisprudence, held that only 'significant' contributions to a group crime satisfy Article 25(3)(d).[5] In a Separate Opinion on appeal, Judge Fernández de Gurmendi argued that the Pre-Trial Chamber had no authority to read the term 'significant' into Article 25(3)(d) and proposed an alternative approach directing adjudicators to analyse the 'normative and causal links' between the acts of an accused and a predicate group crime.[6] The Appeals Chamber declined to explicitly endorse either approach and relied on other grounds to uphold the dismissal of the charges against suspect Callixte Mbarushimana,[7] leaving threshold *actus reus* under Article 25(3)(d) indeterminate.

The lack of clarity resulting from the *Mbarushimana* case has already resulted in further litigation in *Ruto and others*,[8] demonstrating the need for a definitive interpretation of Article 25(3)(d) *actus reus* by the ICC Appeals Chamber. This article compares the competing 'significant' and 'normative and causal links' approaches and concludes that the two approaches appear to dictate similar processes and substantially similar outcomes. Additionally, from a textualist perspective, neither approach is clearly warranted, although the normative and causal links approach appears to fit marginally more comfortably with the text of Article 25(3). Finally, additional policy considerations are briefly considered, yet only serve to highlight the marginal nature of the differences between the two approaches. Therefore, in light of the wholly superficial differences between the two approaches, it is concluded that while the normative and causal links approach may be slightly preferable, adoption of either approach would represent a vast improvement over the confusion and ambiguity concerning Article 25(3)(d) *actus reus* that currently prevails.

4 Decision on Confirmation of Charges, *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber I, 16 December 2011 [*Mbarushimana* PTC Decision]; Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', *Mbarushimana* (ICC-01/04-01/10 OA4), Appeals Chamber, 30 May 2012 [*Mbarushimana* Appeal Decision].

5 *Mbarushimana* PTC Decision, *ibid.*, at § 285.

6 Separate Opinion of Judge Silvia Fernández de Gurmendi, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', *Mbarushimana* (ICC-01/04-01/10 OA4), Appeals Chamber, 30 May 2012 [Fernández de Gurmendi Separate Opinion, *Mbarushimana*].

7 *Mbarushimana* Appeal Decision, *supra* note 4, at §§ 64–69.

8 See e.g. Decision on the Confirmation of Charges Pursuant to Art. 61(7)(a) and (b) of the Rome Statute, *Ruto and Others* (ICC-01/09-01/11), Pre-Trial Chamber II, 23 January 2012 [*Ruto and others* PTC Decision] (dismissing defence argument that Art. 25(3)(d) requires a 'substantial' contribution *actus reus*. The case has been set down for trial, following numerous delays, commencing on 10 September 2013.)

2. JCE and the 'Significant Act' Threshold

On 15 July 1999, the ICTY Appeals Chamber delivered its first judgment in *Tadić*.[9] In its Judgment, the Chamber controversially[10] held that JCE is provided for as a mode of 'commission' under the ICTY Statute, which 'does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons'.[11] In such circumstances, the Chamber stated that '[w]hoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.'[12] The Chamber then described the specific circumstances necessary to impute liability and JCE was established as a mode of liability under ICL.[13] The JCE doctrine has since been applied at four of the five ad hoc international criminal tribunals, which have uniformly held that its core elements form customary international law.[14]

9 *Tadić* Appeal Judgment, *supra* note 1.

10 There is a large body of scholarship critiquing various aspects of JCE. See e.g. M.G. Karnavas, 'Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber's Decision Against the Application of JCE III and Two Divergent Commentaries on the Same', 21 *Criminal Law Forum* (2010) 445; J.D. Ohlin, 'Joint Criminal Confusion', 12 *New Criminal Law Review* (2009) 406; J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice (JICJ)* (2007) 69; G. Sluiter, 'Guilty by Association: Joint Criminal Enterprise on Trial', 5 *JICJ* (2007) 67; J.S. Martinez and A.M. Danner, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75. Such critiques and criticisms, however, are outside the scope of this article, which solely seeks to examine the contextual nature of the *actus reus* required for JCE.

11 *Tadić* Appeal Judgment *supra* note 1, at § 190.

12 *Ibid.*

13 *Ibid.*, at §§ 190–229. Ultimately, Duško Tadić was found liable via JCE for the killings of five men during an attack on Jaskići village he participated in, despite his lack of participation in the actual killings. *Ibid.*, at § 233.

14 See e.g. Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, *Karemera and others* (ICTR-98-44-T), Trial Chamber, 11 May 2004, § 32 ('Given the authoritative jurisprudence of the Appeals Chambers on this matter, the Chamber is satisfied that its jurisdiction on joint criminal enterprise liability is implied in Article 6 (1) of the Statute on the basis of customary international law.'); Decision on the Applicability of Joint Criminal Enterprise, *Nuon Chea and others* (002119-09-2007/ECCC/TC), Trial Chamber, 12 September 2011, §§ 22, 38 (holding that JCE generally formed part of customary international law as of the temporal jurisdiction of the ECCC (1975–1979), but finding the third, extended form of JCE was not part of customary law at the time.); Judgment, *Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007, § 363 [*Brđanin* Appeal Judgment] ('The Appeals Chamber in *Tadić* held that JCE existed as a form of responsibility in customary international law at the time of the events in the former Yugoslavia.'); Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012, §§ 6887–6900 (applying JCE, but holding 'that the Prosecution failed to prove beyond reasonable doubt that the Accused participated in a common plan, design or purpose which amounted to or involved the commission of a crime within the jurisdiction of the Court.'); see also Judgment, *Brima and others* (SCSL-2004-16-A), Appeals Chamber, 22 February 2008, §§ 72–87 (assuming that JCE is available at the SCSL and finding that the Trial

For JCE liability to attach, the accused must have agreed with a plurality of persons to pursue a course of action necessarily involving the commission of at least one international crime.[15] Once this predicate agreement is established the JCE is formed and the accused must subsequently commit a 'significant act in furtherance' of the overall enterprise.[16] The ICTY Appeals Chamber has summarized the *actus reus* of JCE as generally requiring:

> First, a plurality of persons. Second, the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute. Third, the participation of the accused in this common purpose.[17]

In *Tadić*, the Appeals Chamber also divided JCE into three alternative 'categories' of *mens rea*: intent, knowledge and *dolus eventualis* (advertent recklessness).[18]

When JCE was first articulated in *Tadić*, the doctrine lacked a formal limitation on its *actus reus* requirement, as the Appeals Chamber only observed that the requisite 'participation' of the accused 'need not involve commission of a specific crime ... but may take the form of assistance in, or contribution to, the execution of the common plan or purpose'.[19] This rather ambiguous statement suggested that some unstated minimum degree of contribution to the overall JCE was required for liability to attach, but failed to provide an articulated general standard to be used in assessing and differentiating between varying degrees of contribution.

Eventually, the ICTY Trial Chamber inserted such a standard in *Kvočka and others* by holding that JCE requires, at minimum, a 'significant act' in furtherance of the underlying criminal enterprise.[20] The Chamber then clarified that

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Chamber had erred in finding that the prosecution had not properly pleaded JCE in the indictment, but declining to make additional factual findings relevant to JCE.). It is unclear the extent to which the Special Tribunal for Lebanon (STL) will rely on JCE liability, but the STL Appeals Chamber has nonetheless noted that JCE forms part of customary international law. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, *Ayyash and others* (STL-11-01/I), Appeals Chamber, 16 February 2011, §§ 236–262.

15 *Tadić* Appeal Judgment, *supra* note 1, at § 227.

16 *Ibid.* (holding that JCE requires an accused's 'participation ... in the common design'); see also e.g. *Brđanin* Appeal Judgment, *supra* note 14, at § 430 (noting that 'although the contribution [required by JCE] need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible').

17 *Brđanin* Appeal Judgment, *supra* note 14, at § 364 (internal citations omitted); see also Judgment, *Đorđević* (IT-05-87/1-T), Trial Chamber, 23 February 2011, §§ 1862–1863 [*Đorđević* Trial Judgment]; *Tadić* Appeal Judgment, *supra* note 1, at § 227.

18 *Tadić* Appeal Judgment, *supra* note 1, at § 228 (emphasis in original); accord *Brđanin* Appeal Judgment, *supra* note 14, at § 365. While issues of *mens rea* under JCE have engendered much criticism of the doctrine, often involving allegations of an over-inclusive scope of liability that appear similar to the problems identified with Art. 25(3)(d), such arguments are based on the inclusion of the *dolus eventualis mens rea* in JCE. As this article solely comments on Art. 25(3)(d) *actus reus*, a discussion of the nuances of JCE *mens rea* are outside its scope.

19 *Tadić* Appeal Judgment, *supra* note 1, at § 227; see also *Brđanin* Appeal Judgment, *supra* note 14, at § 427.

20 Judgment, *Kvočka and others* (IT-98-30/1-T), Trial Chamber, 2 November 2001, § 309.

'significant ... means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption'.[21] This 'significant' threshold, though rejected on appeal in *Kvočka and others*,[22] has since been adopted by the ICTY Appeals Chamber and become the standard language used to describe the minimal degree of contribution required for JCE liability to attach.[23] For example, in *Brđanin*, the ICTY Appeals Chamber rejected a defence challenge which claimed that JCE was an overbroad mode of liability that lapsed into guilt by association.[24] In doing so, the Chamber cited the significant act standard as proof that JCE adhered to the principle of personal culpability, because under this standard 'not every type of conduct would amount to a significant enough contribution to the crime for [JCE] to create criminal liability for the accused regarding the crime in question'.[25]

The adoption of the term 'significant' to establish a formal *actus reus* threshold for JCE at the ICTY was a key development in ICL group crime jurisprudence. In doing so, the Tribunal acknowledged the need for a formally contextual approach to assessing *actus reus* that honours the principle of personal culpability while also retaining sufficient flexibility to address group crimes ranging widely in size, scope, membership, goals, means and behaviour. The 'significant act' requirement has also proved to be a formal, yet flexible tool to exclude individuals from JCE liability who made minimal contributions to massive group crimes. For example, in *Milutinović and others*, the accused Milan Milutinović, who had served as the President of Serbia, been a member of the Supreme Defence Council (SDC) of the Federal Republic of Yugoslavia (FRY) and was also a close confidant of Slobodan Milošević, was acquitted of charges related to crimes committed throughout Kosovo.[26]

21 *Ibid.*

22 Judgment, *Kvočka and others* (IT-98-30/1-A), Appeals Chamber, 28 February 2005, § 187 ('Contrary to the holding of the Trial Chamber, the Tribunal's case-law does not require participation as co-perpetrator in a joint criminal enterprise to have been significant, unless otherwise stated.') (internal citations omitted).

23 See e.g. *Brđanin* Appeal Judgment, *supra* note 14, at § 430; accord Judgment, *Krajišnik* (IT-00-39-A), Appeals Chamber, 17 March 2009, § 696 ('What matters in terms of law is that the accused lends a significant contribution to the commission of the crimes involved in the JCE.'); Judgment, *Martić* (IT-95-11-A), Appeals Chamber, 8 October 2008, § 79 (holding that the Trial Chamber had properly described the elements of JCE in its Judgment, including the requirement that an accused's contribution to a JCE be 'significant'.); *Đorđević* Trial Judgment, *supra* note 17, at § 1863; Judgment Volume II of II, *Gotovina and others* (IT-06-90-T), Trial Chamber, 15 April 2011, § 1954; Judgment Volume I, *Popović and others* (IT-05-88-T), Trial Chamber, 10 June 2010, § 1027; Judgment Volume I of IV, *Milutinović and others* (IT-05-87-T), 26 February 2009, § 104 [*Milutinović et al.* Trial Judgment I of IV].

24 *Brđanin* Appeal Judgment, *supra* note 14, at §§ 426–432.

25 *Ibid.*, at § 427 (internal citations omitted).

26 *Milutinović et al.* Trial Judgment I of IV, *supra* note 23, at §§ 6–7; *Milutinović et al.* Trial Judgment III of IV, *supra* note 23, at § 275.

In acquitting Milutinović, the Chamber held that, despite having held an extremely high de facto position within the relevant political and military hierarchies, giving 'two morale-boosting speeches', 'fail[ing] to raise certain issues during FRY SDC meetings and generally exhibit[ing] loyalty to Milošević', Milutinović had failed to significantly contribute to the alleged Kosovo-wide JCE.[27] This holding, which was not appealed by the prosecution,[28] demonstrates how the inherently contextual nature of the word 'significant' provides judges applying JCE with a formal mechanism to place the acts of each accused within the relevant group crime dynamic and exclude liability for relatively minor contributions.

3. Group Crime Liability under ICC Statute Article 25(3)(a) and (d)

Just prior to the beginning of the JCE saga in the *Tadić* Appeals Judgment, the text of the ICC Statute was adopted on 17 July 1998.[29] The Statute was the product of intense negotiations[30] which resulted in a document that, by its own terms, does not represent a codification of customary international law and is concomitantly not bound to directly apply custom.[31] Article 25 of the ICC Statute sets out the general modes of liability available at the ICC and deals with the issue of group crime in subsections (a) and (d). Subsection (a) provides for commission liability and covers instances where an accused commits

27 *Milutinović et al.* Trial Judgment III of IV, *supra* note 23, at § 275. Holding:

> Milutinović did participate in the 21 July 1998 meeting with the rest of the leadership when the Plan for Combating Terrorism was approved and the Joint Command established. He also participated in the similar meeting, on 29 October, when the results of these activities were discussed. He also gave two morale-boosting speeches to the [Serbian Ministry of Internal Affairs]. In addition, he failed to raise certain issues during SDC meetings and generally exhibited loyalty to Milošević. In the Chamber's view, however, this was not a significant contribution to the joint criminal enterprise.

28 See Notice of Filing of Public Redacted Version of Prosecution Appeal Brief, *Šainović and others* (IT-05-87-A), Office of the Prosecutor, 21 August 2009 (appeal brief submitted by prosecution completely omitting Milutinović from the case).

29 ICCSt.

30 For a detailed discussion of the negotiating process leading to the conclusion of the ICC Statute, see D. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2012), at 163–226.

31 Art. 10 ICCSt. ('nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'); see also B. Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the Ad hoc Tribunals', 12 *International Criminal Law Review* (2012) 1, at 3–4, citing Decision on the Confirmation of Charges, *Katanga & Ngudjolo Chui* (ICC-01/04-01/07-717), Pre-Trial Chamber, 30 September 2008, § 508; see also G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', 5 *JICJ* (2007) 953, at 961.

a crime 'whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible'.[32] Subsection (d) covers instances where an accused '*[i]n any other way contributes* to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.'[33]

As the ICC began its work, it remained unclear whether the Court would read-in JCE as an available mode of commission under Article 25(3)(a) or (d). Despite the fact that the *Tadić* Appeals Chamber characterized Article 25(3)(d) as a 'substantially similar notion' to JCE,[34] the ICC has thus far uniformly declined to read-in JCE liability as versions of either co-perpetration[35] or contribution liability.[36] Meanwhile, Article 25(3)(a) co-perpetration liability has developed its more stringent version of a contextual *actus reus* threshold than JCE's 'significant act' requirement, whereas contribution liability under Article 25(3)(d) currently lacks any definitive *actus reus* threshold, as the Appeals Chamber has yet to comprehensively address the issue. The ultimate decision on the issue will be a fundamental one, as it will be determinative of basic issues of guilt versus innocence in many cases by establishing the general outer boundary of *actus reus* at the ICC.

A. Co-Perpetration at the ICC: The 'Essential Contribution' Threshold

In *Lubanga*, a majority of ICC Trial Chamber I, borrowing from German criminal law theory, held that under Article 25(3)(a) 'the contribution of the co-perpetrator must be essential' and cited a stream of ICC jurisprudence in support of this standard.[37] Pre-Trial Chamber I, in its Decision on the Confirmation of Charges in *Lubanga* had previously held that 'only those to whom essential tasks have been assigned — and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks — can be said to have joint control over the crime' and thereby qualify as co-perpetrators.[38] Although the Trial Chamber refrained from explicitly endorsing the Pre-Trial Chamber's 'power to frustrate' language, it did not expressly reject such language either and a majority of the Chamber found that Lubanga had indeed made an essential contribution to a common plan involving

32 Art. 25(3)(a) ICCSt.

33 Art. 25(3)(d) ICCSt. (emphasis added).

34 *Tadić* Appeal Judgment, *supra* note 1, at § 222.

35 See e.g. Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012, §§ 972–1018 [*Lubanga* Trial Judgment] (discussing the scope of co-perpetration liability under Art. 25(3)(a) ICCSt. without referencing JCE and concluding that co-perpetration requires various elements distinct from JCE including, inter alia, that the accused make an 'essential contribution' to the underlying common purpose).

36 See e.g. *Mbarushimana* PTC Decision, *supra* note 4; *Mbarushimana* Appeal Decision, *supra* note 4 (both Chambers holding that Art. 25(3)(d) is distinct from JCE).

37 *Lubanga* Trial Judgment, *supra* note 35, at § 999 (internal citations omitted).

38 Decision on Confirmation of Charges, *Lubanga* (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber, 29 January 2007, § 347.

the conscription of child soldiers.[39] The Trial Chamber did not attempt to define the precise line where an act becomes 'essential', but did state that the standard encompasses, inter alia, individuals who 'assist in formulating the relevant strategy or plan, become involved in directing or controlling other participants or determine the roles of those involved in the offence'.[40] The majority also held that an alleged 'co-perpetrator's role is to be assessed on a case-by-case basis ... [which] involves a flexible approach, undertaken in the context of a broad inquiry into the overall circumstances of a case'.[41]

While the essential contribution threshold appears to be on its way to entrenchment in ICC jurisprudence, it is not without its critics. ICC Trial Chamber Judges Fulford and Van den Wyngaert have both distanced themselves from the essential contribution threshold.[42] For both judges, it is impermissible for the ICC to rely solely on German criminal law theory in an international setting and reading the term 'essential' into Article 25(3)(a) violates the plain language of the ICC Statute.[43] In Judge Fulford's view, 'the use of the word "commits" [in Article 25(3)(a)] simply requires an operative link between the individual's contribution and the commission of the crime'.[44] Judge Fulford subsequently described this 'link' as 'causal' in relation to the charged crime(s).[45] For Judge Van den Wyngaert, the limiting *actus reus* consideration is whether an accused's acts formed a 'direct' contribution to the crime, defined as 'an immediate impact on the way in which the material elements of the crimes are realised'.[46]

While Judge Fulford leaves his description of the appropriate threshold of participation under Article 25(3)(a) in the abstract form of a 'causal link', Judge Van den Wyngaert acknowledges that her approach retains a contextual evaluative process, stating that '[w]hether a contribution qualifies as direct or indirect is not something that can be defined in the abstract. It is something the Court must appreciate in the specific circumstances of each case.'[47] Thus, while the ICC judiciary has not yet reached final consensus regarding how to define *actus reus* under Article 25(3)(a), the Court has thus far required an 'essential contribution', which must be assessed contextually on a case-by-case basis. While this requirement appears stricter than the

39 *Lubanga* Trial Judgment, *supra* note 35, at §§ 1270–1272.

40 *Ibid.*, at § 1004.

41 *Ibid.*, at § 1001.

42 See Separate Opinion of Judge Adrian Fulford, Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber, 14 March 2012 [Fulford Separate Opinion, *Lubanga*]; Concurring Opinion of Judge Christine Van den Wyngaert, Judgment Pursuant to Art. 74 of the Statute, *Chui* (ICC-01/04-02/12), Trial Chamber, 18 December 2012, §§ 40–48 [Van den Wyngaert Concurring Opinion, *Chui*] (concurring with Judge Fulford's critique of insertion of an essential contribution requirement into Art. 25(3)(a) and that instead, liability should be established only where an accused's actions form a 'direct' contribution to the charged crime(s)).

43 *Ibid.*

44 Fulford Separate Opinion, *Lubanga*, *supra* note 42, at § 15.

45 *Ibid.*, at § 16(c).

46 Van den Wyngaert Concurring Opinion, *Chui*, *supra* note 42, at §§ 44, 46.

47 *Ibid.*

'significant act' threshold utilized in JCE jurisprudence, the two terms are similarly oriented to formally assess the relative importance of an accused's acts within a larger overall group criminal dynamic. Furthermore, the proposed alternative approaches of Judges Fulford and Van den Wyngaert both appear to solely advocate for alternative methods of engaging in what would be essentially the same exercise of considering the role of the accused in relation to the overall criminal transaction, thus reflecting the inherently contextual reality of assessing individual culpability within group crime scenarios.

B. ICC 'Contribution' Liability in Mbarushimana

On 28 September 2010, ICC Pre-Trial Chamber I issued an arrest warrant for Callixte Mbarushimana, finding 'reasonable grounds to believe' he was 'criminally responsible within the meaning of Article 25(3)(d) of the [Rome] Statute' for various war crimes and crimes against humanity allegedly committed by the Democratic Forces for the Liberation of Rwanda (FDLR) in the Democratic Republic of the Congo (DRC).[48] Mbarushimana was arrested in France on 11 October 2010 and transferred to ICC authorities in The Hague on 25 January 2011.[49] Following a hearing on the confirmation of charges, a majority of the ICC Pre-Trial Chamber held that the prosecution had failed to establish the requisite 'substantial grounds to believe' that Mbarushimana was responsible for any of the alleged crimes and ordered his release.[50] This decision was upheld by the Appeals Chamber on 30 May 2012.[51]

The prosecution's theory of the case in *Mbarushimana* was that in 2009, 'the FDLR hierarchy launched a campaign aimed at attacking the civilian population and creating a "humanitarian catastrophe" in the Kivu provinces of DRC', involving the commission of war crimes and crimes against humanity, 'in order to draw the world's attention to the FDLR's political demands'.[52] The charges against Mbarushimana were based on his role as the FDLR's 'Executive Secretary' and actions in this capacity of issuing press releases and serving as the public face of the FDLR internationally.[53] In conducting these activities, the prosecution alleged that Mbarushimana knowingly contributed to 'a significant part of the [FDLR's alleged] strategy of attacking the civilian population' namely by 'publicly denying any responsibility of the FDLR for the

48 Warrant of Arrest for Callixte Mbarushimana, *Mbarushimana* (ICC-01/04-01/10), Pre-Trial Chamber, 28 September 2010, § 10.

49 See *Situation in Democratic Republic of the Congo*, available online at the ICC website: http://www.icc-cpi.int/EN.Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200104/Pages/situation%20index.aspx (visited 2 July 2013).

50 *Mbarushimana* PTC Decision, *supra* note 4, at § 340.

51 *Mbarushimana* Appeal Decision, *supra* note 4, at § 70 (confirming the decision of the Pre-Trial Chamber to dismiss the charges).

52 *Mbarushimana* PTC Decision, *supra* note 4, at § 6.

53 *Ibid.*, at §§ 6–8.

losses entailed by those attacks, in some instances blaming other armed parties to the conflict'.[54]

1. *Pre-Trial Chamber I Adopts a 'Significant' Contribution Threshold*

Despite finding the requisite 'substantial grounds to believe' that FDLR forces had committed war crimes, Pre-Trial Chamber I dismissed the charges against Mbarushimana, finding that the prosecution had failed to establish sufficient grounds to impute liability via Article 25(3)(d).[55] A majority of the Chamber found three alternative grounds for dismissing the charges: (i) the FDLR organization did not constitute a common criminal purpose; (ii) even if the FDLR did qualify as a criminal purpose, Mbarushimana 'did not provide any contribution to the commission' of the charged crimes; and (iii) even if Mbarushimana's acts did contribute to the commission of crimes, the degree of such contribution was insufficient as a matter of law because it was not 'significant'.[56] Although all three of these grounds are relevant to determining the proper scope of Article 25(3)(d), it is the Pre-Trial Chamber's third holding, requiring that an accused's contribution be 'significant' as a matter of law that is considered here, as the adoption of such a requirement would definitively identify a generally applicable threshold *actus reus*.[57]

In *Mbarushimana*, the Pre-Trial Chamber first noted that 'it would be inappropriate for [Article 25(3)(d)] liability to be incurred through *any* contribution to a group crime'.[58] The Chamber then reasoned that a 'certain threshold of significant' is 'necessary to exclude contributions which, because of their level or nature, were clearly not intended by the drafters of the [ICC] Statute to give rise to individual criminal responsibility'.[59] Absent such a threshold, the Chamber echoed the concerns of ICL scholar Jens David Ohlin that 'every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability'.[60] Such a

54 *Ibid.*, at § 7.

55 *Ibid.*

56 *Ibid.*, at §§ 291–292 (Judge Sanji Mmasenono Monageng dissenting solely regarding assessment of the facts, which he found sufficient to confirm the charges).

57 The fact that the FDLR was found to not have formed a common criminal purpose was likely the product of the prosecution's pleadings in *Mbarushimana* itself as the prosecution failed to demonstrate that the FDLR pursued a policy of committing international crimes. *Mbarushimana* PTC Decision, *supra* note 4, at § 291. Furthermore, assuming that the FDLR or certain elements within the FDLR could be properly considered a common criminal purpose, it appears intellectually dishonest to assert that Mbarushimana made absolutely no contribution to the crimes committed by the group, as he clearly was an active and high-level member of the FDLR and his propaganda efforts are difficult to view as forming absolutely no contribution to the group. See generally *ibid.*, at §§ 293–303.

58 *Ibid.*, at § 276 (emphasis in original).

59 *Ibid.*, at §§ 276–277.

60 *Ibid.* The Chamber observes Ohlin's substantially similar concerns in footnote 656. Citing Ohlin, 'Three Conceptual Problems', *supra* note 10, at 79.

result would render the liability at the ICC 'overextended' in the view of the Chamber.[61]

In choosing to employ the word 'significant' to limit the ambit of Article 25(3)(d) liability, the Chamber borrowed from JCE jurisprudence, noting that although Article 25(3)(d) and JCE liability are 'not identical' they are similar in that both 'emphasise group criminality and actions performed in accordance with a common plan'.[62] Furthermore, the Chamber noted that determination of which 'contributions' to group crimes qualify as 'significant' 'requires a case-by-case assessment, as it is only by examining a person's conduct *in proper context* that a determination can be made as to whether a given contribution has a larger or smaller effect on the crimes committed'.[63] In conducting this analysis, the Chamber enumerated five factors it considers useful to guide this process, including:

(i) the sustained nature of participation after acquiring knowledge of the criminality of the group's common purpose;
(ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group's crimes;
(iii) whether the person creates or merely executes the criminal plan;
(iv) the position of the suspect in the group or relative to the group; and
(v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed.[64]

2. *The Appeals Chamber Refuses to Engage*

Although in *Mbarushimana* Pre-Trial Chamber I proposed a specific interpretation of a critically important point of law by requiring a 'significant' contribution under Article 25(3)(d), the majority of the Appeals Chamber declined to fully engage the issue. Instead, the majority upheld the Pre-Trial Chamber's findings that the evidence adduced by the prosecution failed to demonstrate that the FDLR itself constituted a common criminal purpose or alternatively, that Mbarushimana did not contribute in any way to the charged crimes.[65] The

61 *Ibid.*

62 *Ibid.*, at § 282. The Chamber noted the following differences between JCE and Art. 25(3)(d): (i) JCE provides for principal liability as a mode of commission, while 25(3)(d) is a form of accessorial liability; (ii) JCE requires that the accused be a member of the underlying common purpose, while 25(3)(d) does not require such membership; (iii) JCE only requires that the accused make a contribution to the underlying common purpose generally, while 25(3)(d) requires that the accused contribute to the specific charged crime(s); and (iv) differing *mens rea* requirements. *Ibid.*

63 *Ibid.*, at § 284 (emphasis added).

64 *Ibid.*

65 *Mbarushimana* Appeal Decision, *supra* note 4, at §§ 69–70. The decision to uphold the dismissal was unanimous, with Judge Fernández de Gurmendi solely disagreeing with the majority concerning whether the Chamber should opine on the issue of the legal *actus reus* threshold under Art. 25(3)(d).

majority declined to address the issue of threshold *actus reus* under Article 25(3)(d) because 'it would be doing so in a vacuum and thereby be engaging in what would be a purely academic discussion'.[66]

3. *Judge Fernández de Gurmendi's 'Normative and Causal Links' Approach*

The decision not to engage this critical issue was strongly rebuked by Judge Silvia Fernández de Gurmendi in a Separate Opinion.[67] Judge Fernández de Gurmendi argued that the Pre-Trial Chamber's 'significant contribution' standard permeated all aspects of its assessment of the case against Mbarushimana and also that the prosecution should be notified of the applicable standard should it seek to bring additional evidence in the case and, therefore, the Chamber should have fully engaged the issue.[68] She then undertook her own analysis and arrived at the conclusion that the plain language of Article 25(3)(d) bars the adoption of a 'significant' *actus reus* threshold and, therefore, the Pre-Trial Chamber judges had erred by relying on JCE jurisprudence and the policy concern of excluding liability for 'infinitesimal' contributions to group crimes.[69]

For Judge Fernández de Gurmendi, the main issue of concern related to the threshold *actus reus* under Article 25(3)(d) is that of 'so-called "neutral" contributions' which she argues is 'better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution'.[70] She also considers terms such as 'significant' unhelpful because '[d]epending on the circumstances of a case, providing food or utilities to an armed group might be a significant, a substantial or even an essential contribution to the commission of crimes', rendering such classifications largely unhelpful.[71]

4. *The Need for Clarity Moving Forward*

The lack of engagement by the Appeals Chamber in *Mbarushimana* has left the minimum *actus reus* demanded by ICC Statute Article 25(3)(d) unclear. This state of confusion has already led to further disagreement in *Ruto and others*, wherein Pre-Trial Chamber II confirmed charges of crimes against humanity against

66 *Ibid.*, at § 68.

67 Separate Opinion, Fernández de Gurmendi, *Mbarushimana*, *supra* note 6.

68 *Ibid.*, at §§ 4–5.

69 *Ibid.*, at §§ 7–14. The arguments of Judge Fernández de Gurmendi in *Mbarushimana* appear similar to those put forward by Judges Fulford and Van den Wyngaert concerning the adoption of an essential contribution *actus reus* requirement under Art. 25(3)(a) co-perpetration in that all three judges rely on the textualist argument that qualifying language cannot be inserted into the ICC Statute regardless of policy implications or the practical desirability of doing so.

70 *Ibid.*, at § 12.

71 *Ibid.*

suspect Joshua Arap Sang pursuant to Article 25(3)(d).[72] In confirming the charges, the Chamber rejected the Sang defence team's argument that Article 25(3)(d) requires a 'substantial contribution' to the predicate group crime, but unlike Pre-Trial Chamber I in *Mbarushimana*, Chamber II declined to indicate what, if any, minimum degree of contribution is required under Article 25(3)(d).[73]

In a subsequent submission to Trial Chamber V in *Ruto and others*, the prosecution argued that the acts of Sang's co-accused, William Samoei Ruto, should they be found insufficient to satisfy other modes of liability under Article 25(3), 'clearly surpasses the "any" contribution standard' of Article 25(3)(d).[74] The Sang defence team responded to this assertion with a submission to the Trial Chamber arguing that the requisite *actus reus* 'is greater than just "any" contribution, and must be a "significant" if not "substantial" contribution'.[75] In advocating for at least a 'significant' standard, the defence argued that the five factors indicated as probative of significance by Pre-Trial Chamber I in *Mbarushimana* were essentially the same factors relevant to satisfying Judge Fernández de Gurmendi's proposed normative and causal links approach, as 'it is the normative and causal links between the contribution and the crime that would assist the trier of fact in determining whether a contribution is "significant"'.[76] *Ruto and others* thus highlights the need for the ICC Appeals Chamber to adopt a definitive interpretation of the threshold *actus reus* required by Article 25(3)(d) in order to provide a clear standard moving forward.

4. 'Significant' Contributions and 'Normative and Causal' Links

ICL group crime jurisprudence demonstrates that appropriately limiting the scope of ICC Statute Article 25(3)(d) *actus reus* necessitates the adoption of a contextual approach.[77] The 'significant' contribution and 'normative and

72 *Ruto and others* PTC Decision, *supra* note 8, at § 366.

73 *Ibid.*, at §§ 353–354.

74 Prosecution's Submissions on the law of indirect co-perpetration under Art. 25(3)(a) of the Statute and application for notice to be given under Reg. 55(2) with respect to William Samoei Ruto's individual criminal responsibility, *Ruto and Sang* (ICC-01/09-01/11), Trial Chamber V, 3 July 2012, § 34. In support of its assertion of that the 'any' contribution standard was not qualified in any way, the prosecution cited the Separate Opinion of Judge Fernández de Gurmendi on appeal in *Mbarushimana* and argued in the alternative, that the evidence demonstrated that Ruto's contributions would also surpass the 'significant' threshold, should it be found to apply. *Ibid.*, fn. 71.

75 Defence Response to Prosecution's Submissions on the law of indirect co-perpetration under Art. 25(3)(a) of the Statute and application for notice to be given under Reg. 55(2) with respect to William Samoei Ruto's individual criminal responsibility, *Ruto and Sang* (ICC-01/09-01/11), Trial Chamber V, 25 July 2012, § 3 [Defence Response, *Ruto and Song*].

76 *Ibid.*, at § 16.

77 Indeed, the need for contextualization is highlighted by the fact that even competing interpretations of group crime *actus reus* thresholds within the JCE doctrine and Art. 25(3) ICCSt. all include elements that direct judges to assess the acts of an accused within a larger context. See e.g. *Milutinović et al.* Trial Judgment III of IV, *supra* note 23, at § 275 (acquitting the accused

causal links' approaches provide the Appeals Chamber with two competing avenues for doing so. Thus, the question becomes which approach is preferable in light of the language of the ICC Statute and the practical need to establish some outer limit on the bounds of Article 25(3)(d) *actus reus*. Consideration of these two issues demonstrates, however, that for all practical purposes, acts that qualify as 'significant' contributions appear substantially the same as acts normatively and causally linked to a group crime. This observation, in light of the fact that neither approach is clearly favoured by the text of the ICC Statute, leads to the conclusion that the pressing issue is not *which* of the two approaches is ultimately adopted by the Appeals Chamber, but more simply that *either* approach be adopted in order to expressly acknowledge the need to contextually delimit *actus reus* under Article 25(3)(d).

A. A Difference in Name Only? Practical Considerations

Both Pre-Trial Chamber I and Judge Fernández de Gurmendi stated concern over the indeterminate scope of *actus reus* under the plain language of Article 25(3)(d) in *Mbarushimana*. The Pre-Trial Chamber sought to avoid the imputation of liability for 'infinitesimal' contributions, while Judge Fernández de Gurmendi argued that the real danger is the imposition of liability for the 'so-called "neutral" contributions'.[78] As discussed previously, the Pre-Trial Chamber was specifically concerned that absent some limitation, *every* landlord, grocer, utility provider, secretary, janitor or even taxpayer, whose actions tangentially contribute to a group crime could face potential criminal liability under Article 25(3)(d).[79] Judge Fernández de Gurmendi acknowledged these concerns, but is 'not persuaded that such contributions would be adequately addressed' by inserting a significant contribution requirement, because in her view contributions such as the provision of food or utilities could qualify as 'essential', 'substantial' or 'significant' depending on the circumstances of each case.[80] Judge Fernández de Gurmendi, however, did not describe how a

because his contributions to the underlying JCE were not 'significant' as a matter of law); *Lubanga* Trial Judgment, *supra* note 35, at §1004 (a majority of the Chamber holding that application of Art. 25(3)(a) ICCSt. co-perpetration requires a 'case-by-case analysis ... undertaken in the context of a broad inquiry into the overall circumstances of a case'); Van den Wyngaert, Concurring Opinion, *Chui*, *supra* note 42, at § 46 (stating that her proposed approach to Art. 25(3)(a) which removes the 'essential' contribution *actus reus* element and replaces it with one which limits liability to only 'direct' contributions, which 'the Court must appreciate in the specific circumstances of each case'); *Mbarushimana* PTC Decision, *supra* note 4, at § 292 (holding that only acts which significantly contribute to a group criminal enterprise satisfy Art. 25(3)(d) ICCSt.); Separate Opinion, Fernández de Gurmendi, *Mbarushimana*, *supra* note 6, at § 12 (advocating for an approach to Art. 25(3)(d) *actus reus* which involves 'analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution').

78 *Mbarushimana* PTC Decision, *supra* note 4, at § 277; cf. *Mbarushimana*, Separate Opinion, Fernández de Gurmendi, *Mbarushimana*, *supra* note 6, at § 12.

79 See *Mbarushimana* PTC Decision, *supra* note 4, at § 277.

80 *Mbarushimana*, Separate Opinion, Fernández de Gurmendi, *Mbarushimana*, *supra* note 6, at § 12.

'normative and causal links' approach would better guard against the imposition of liability predicated on such acts and furthermore, her argument appears misplaced, as the Pre-Trial Chamber did not evince a desire to absolutely preclude liability for the types of contributions listed, but emphasized concern that *every* such act, regardless of its contextual significance, might satisfy Article 25(3)(d). As such, what the Pre-Trial Chamber sought to achieve through the insertion of the 'significant' contribution threshold does not appear to be a categorical exclusion of any type of contributions, but rather to create a standard whereby the characterization of the degree of an accused's contribution to a group crime is considered within the circumstances of each case.

Indeed, without further elaboration on the 'normative and causal links' approach, it is difficult to forecast how, if at all, this understanding of Article 25(3)(d) would differ in application from the imposition of a 'significant' threshold. The Ruto defence has argued that functionally the approaches are indistinguishable because 'it is the normative and causal links between the contribution and the crime that would assist the trier of fact in determining whether a contribution is "significant"'.[81] Applying the two approaches to the scenario of a grocer who supplies food to a criminal group serves to highlight the currently indistinguishable scope of liability for each approach, as both the significant contribution and normative and causal link approaches appear to provide for identical results.

In the first hypothetical permutation, the grocer simply sells food to an armed group in a routine commercial transaction. The acts of this grocer are intuitively non-criminal, but clearly do contribute to group's basic ability to sustain itself in a very basic way. In such a case, both approaches provide the necessary tools to exclude the grocer from the reach of Article 25(3)(d). The grocer's acts are prima facie insignificant vis-à-vis the actual commission of crimes by the group, thus excluding his acts from the scope of Article 25(3)(d) according to the significant contribution approach. Similarly, the grocer's behaviour of selling goods indiscriminately to all customers does not appear to be normatively or causally linked to the group's criminal acts. Conversely, if neither limitation is utilized, the plain language of Article 25(3)(d) could arguably encompass the acts of the grocer, as he could be seen as contributing to the subsequent crimes of the group by furnishing the group with supplies necessary for the continuation of its criminal activities.

These results can be contrasted with a scenario wherein the same grocer takes some step in assisting the criminal group beyond merely treating it as a regular customer, such as by covertly providing the group with food. Depending on the context, such acts could satisfy the *actus reus* of Article 25(3)(d) under both proposed approaches. If the covert provision of food enhances the group's ability to evade detection, in such a context the grocer's

81 Defence Response, *Ruto and Song*, *supra* note 75, at § 16.

contribution to the group could be characterized as 'significant' according to the factors outlined by Pre-Trial Chamber I in *Mbarushimana*.[82] Similarly, in this scenario, the acts of the grocer become more likely to share normative and causal links with the crimes of the armed group. Assisting a criminal group to operate more efficiently or clandestinely transgresses norms of expected behaviour and can be causally linked to the criminal behaviour of the group, creating the potential applicability of Article 25(3)(d) under Judge Fernández de Gurmendi's proposed approach.

Furthermore, as the scenario is tweaked to increase or decrease normative and causal linkages, the acts of the grocer would also concomitantly become proportionately more or less significant. For example, if it is typical practice for grocers to deliver food orders anonymously in the relevant market, both the significance of the grocer's role and the normative and causal links between such acts and the group's criminal behaviour is diminished. Conversely, if obtaining a covert food supply is a major obstacle to the successful operation of the criminal group, both the significance of the grocer's acts and the normative and causal links with the group's criminal behaviour increase accordingly. As such, the concepts of significance and normative and causal linkages appear inextricably intertwined and practically indistinguishable.

B. Textual Approaches

Just as the practical scopes of the 'significant' contribution and 'normative and causal' links approaches appear indistinguishable, both approaches similarly lack clear support in the text of Article 25(3)(d). According to the Vienna Convention on the Law of Treaties, the ICC Statute must be interpreted in 'good faith in accordance with the ordinary meaning to be given to [its] terms ... in their context and in the light of its object and purpose'.[83] The plain language of ICC Statute Article 25(3)(d) contains no explicit limit on the range or minimal degree of contributions required. Furthermore, the preamble of the ICC Statute simply calls for the 'effective prosecution' of international crimes and an end to impunity[84] as key goals, but makes no references

82 See *Mbarushimana*, PTC Decision, *supra* note 4, at § 284 (reproduced *supra* at 15). In this scenario, the grocer continues to assist despite his knowledge of their criminal acts (factor 1). The grocer makes no effort to prevent criminal activity and actually improves, rather than impedes the efficiency of the group's ability to continue committing crimes by helping it to operate clandestinely (factor 2). The grocer does not necessarily hold a position within the group, but his position relative to the group is closer than that in the previous scenario, as the grocer does not assist the group in a manner not typical to the normal buyer–seller relationship (factor 4). The role of the grocer vis-à-vis the 'seriousness and scope of the crimes' remains unclear, as it would depend on how important obtaining a covert supply of food was to the group's ability to commit crimes (factor 5). Nonetheless, the grocer's role in the crimes appears more significant than in the previous scenario. These factors would thus, appear to create the possible application of Art. 25(3)(d) in the latter scenario, depending on the elucidation of additional contextual factors relative to the importance of the grocer's role.

83 Art. 31(1) Vienna Convention on the Law of Treaties.

84 Preamble, ICCSt.

regarding what interpretation of *actus reus* best serves these goals. As such, neither a plain language nor an 'object and purpose' approach appears to prima facie favour either proposed approach to Article 25(3)(d).[85]

While neither approach is supported by the language of the ICC Statute, it is doubtful that radically expanding the scope of liability under ICL to capture even the most minor contributions to group crimes would enhance the 'effectiveness' of prosecutions or help end impunity. If anything, opening such a floodgate of liability would only serve to deflect prosecutorial attention towards low-level perpetrators and away from the powerful figures who are typically most responsible for the commission of international crimes. Thus, some qualification on the open-ended language of Article 25(3)(d) appears to be generally warranted by the object and purpose of the ICC Statute. Depending on how the language of Article 25(3)(d) is interpreted, the normative and causal links approach may be marginally preferable to the adoption of a significant contribution, as it would arguably do less violence to the text of the Statute.

Pre-Trial Chamber I held that only when an accused *significantly* contributes to a group crime 'in any other way' than those provided for in Article 25(3)(a)–(c), is *actus reus* under Article 25(3)(d) established,[86] thereby inserting substantive qualification on the text as written. Judge Fernández de Gurmendi's approach, however, neatly avoids the insertion of a quantitative *actus reus* threshold by directing adjudicators to qualitatively analyse linkages between the acts of the accused and the predicate group crime.[87] As such, one could argue that Judge Fernández de Gurmendi's approach merely clarifies the definition of the term 'contributes' under Article 25(3)(d) by establishing that a contribution is an act normatively and causally linked to the relevant crime. Furthermore, if the term 'any' in Article 25(3)(d) is interpreted as modifying both the terms 'way' and 'contributes' in the phrase 'in any other way contributes', insertion of the qualifier 'significant' comes into direct textual conflict with the resultant 'any contribution' standard.[88] This clear textual distinction, however, becomes less clear if, as argued by the Ruto defence team, the term 'any' in Article 25(3)(d) is viewed as referring solely to the '*type* of contribution, rather than the threshold *degree* of contribution'.[89] Under this view, the term 'any' does not modify the term 'contributes', leaving the latter term simply unqualified. This interpretation appears grammatically warranted and is arguably also supported by the preamble of the ICC Statute, as the goals of

85 Art. 25(3)(d) ICCSt.

86 *Mbarushimana*, PTC Decision, *supra* note 4, at § 285.

87 See Separate Opinion, Fernández de Gurmendi, *Mbarushimana*, *supra* note 6.

88 Judge Fernández de Gurmendi appears to hold this view, as in her Separate Opinion, she states that '[t]he phrase "in any other way" indicates that there should not be a minimum threshold level of contribution under [Art. 25(3)(d)].' Separate Opinion, Fernández de Gurmendi, *Mbarushimana*, *supra* note 6, at § 9. See also *ibid.*, at § 13 (characterizing the Pre-Trial Chamber's argument as improperly 'favouring a threshold between "any" contribution and a "substantial" contribution', suggesting again that the term 'any' forms a substantive as well as descriptive threshold of liability under Art. 25(3)(d).).

89 Defence Response, *Ruto and Sang*, *supra* note 75, at § 10 (emphasis in original).

effective prosecution of international crimes and ending impunity would not appear to be served by focusing massive amounts of time, energy and scarce court resources on the prosecution of individuals who made *insignificant* contributions to a crime. Finally, there is clear precedent for reading-in substantive qualifications on contextual *actus reus* requirements for group crimes. Various ICC Chambers have not balked at inferring an 'essential' contribution standard under Article 25(3)(a) co-perpetration. Similarly, within JCE jurisprudence, the term 'significant' was eventually inserted to describe the process of contextually assessing the relative importance of the acts of each accused and whether they were sufficient to impute direct, commission liability that ICTY judges had arguably been engaging in since the *Tadić* Appeal Judgment itself.[90]

Thus, the text of Article 25(3)(d) is silent concerning both the definition of the term 'contribution' and whether any substantive threshold applies thereto and as such, neither the 'significant' contribution nor 'normative and causal links' approaches can be conclusively viewed as textually warranted by the ICC Statute. Nonetheless, from a textualist perspective, the latter approach appears marginally preferable, as it defines the term contribution as an act normatively and causally linked to a result, while the former approach would simply insert a substantive qualification into the text of Article 25(3)(d).

C. Other Considerations

Additional considerations similarly fail to establish the clear superiority of either approach. While the significant contribution approach represents a relatively simple and known process, being clearly drawn from well-established JCE jurisprudence, the normative and causal links alternative remains relatively opaque concerning its specific requirements, as it is laid out in short shrift by Judge Fernández de Gurmendi in *Mbarushimana*. Reliance on the JCE doctrine, however, would expose the ICC to some of the criticisms of JCE the Court has thus far managed to avoid. Conversely, Judge Fernández de Guzman's approach lacks any interpretational jurisprudence, but does provide an opportunity for the ICC to blaze a new trail forward and in doing so, potentially sidestep some of the controversy JCE has engendered. As a new and untested legal test containing the terms 'normative', 'causal' and 'links', Judge Fernández de Gurmendi's approach would, however, require extensive judicial interpretation that would be largely avoided by adoption of a simpler 'significant' standard. To routinely ask judges to analyse the normative linkages between the acts of an accused and complex group criminal dynamics, could

90 Prior to the adoption of the significant act threshold, ICTY judges applying the doctrine consistently held that not any contribution to a criminal enterprise was sufficient for JCE liability to attach, but failed to state what threshold generally applied, instead relaying on a case-by-case approach to assessing *actus reus*. Over time, beginning with the *Kvočka and others* Trial Judgment, the threshold of 'significant' became standard language to describe the minimum level of contribution required for JCE applicability. See authorities cited *supra* in note 23.

repeatedly present the type of 'academic exercises' in each Article 25(3)(d) case that the Appeals Chamber sought to avoid in *Mbarushimana*.[91] Thus, from a pure policy perspective, both approaches present both important opportunities and challenges.

5. Conclusion: Either Choice Better than Silence

The contentious and difficult task of drawing the proper scope of individual liability for group crimes is demonstrated by the complex and evolving doctrines of JCE at the ad hoc tribunals and liability under subsections (a) and (d) of Article 25(3) ICC Statute. A major aspect of this struggle to individualize group criminality has been focused on identifying a threshold *actus reus* for each mode of liability that encompasses the acts of key contributors to group crimes, but excludes from liability those individuals who make exceedingly minor or unimportant contributions. While JCE jurisprudence has embraced a 'significant' act threshold and co-perpetration at the ICC currently requires an 'essential contribution' to an underlying group criminal purpose, Article 25(3)(d) contribution liability at the ICC currently lacks clearly applicable similarly limiting language, as the Appeals Chamber declined to opine on the issue in *Mbarushimana*. Moving forward, a clear threshold of liability under Article 25(3)(d) must be adopted to provide clarity and avoid the potentiality for boundless group crime liability.

Any appropriate approach to limiting *actus reus* under Article 25(3)(d) must necessarily allow for some process of contextualizing the acts of the accused within the larger group crime dynamic in order to maintain necessary flexibility and reflect the nature of group crime at the international level. Both the 'significant' contribution and 'normative and causal links' tests proposed in *Mbarushimana* present attractive contextual mechanisms of limiting the scope of liability. While arguably the latter approach meshes more neatly with the text of the ICC Statute, for all practical intents and purposes, the two approaches appear virtually indistinguishable, as any differences between the two standards would turn on rather subjective judicial considerations of what acts are significant or normatively and causally linked to a larger group crime. Thus, the choice between the two approaches appears to be essentially a choice in name only, with the normative and causal links a marginally preferable alternative to the importation of

91 This is further complicated by the fact that the normative underpinnings of ICL as a discipline have not been systematically elucidated and international crimes are widely considered self-evidently criminal. See e.g. I. Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *European Journal of International Law* (2002) 561, at 565 (Arguing that '[t]he "international criminal justice system" has no proper justifications of its own, so far [although i]t could be claimed that it is merely an extension, by delegation, of the state power to determine criminal law norms and to punish.').

oft-criticized JCE concepts to the ICC. The much more pressing need, however, is simply for the ICC Appeals Chamber to take a clear and definitive stand on the issue, as any decision of the Chamber definitively adopting either standard would represent a marked improvement over the currently amorphous and potentially boundless scope of Article 25(3)(d) in the wake of *Mbarushimana*.